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No. 09-755; 09-817

SUPREME COURT, U.S.
MAR 5 - 2010

IN THE

Supreme Court of the United States

LOUIS DALE MARCANTEL, individually and in his official capacity as Chief of Police of the Village of Turkey Creek,

Petitioner,

and

DEWAYNE TARVER, individually and in his official capacity as Duly Commissioned Officer by the Village of Turkey Creek,

Petitioner,

v.

MICHELL B. DEVILLE and RICKY JAMES DEVILLE,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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SUMMARY OF THE ARGUMENT

Both Writ Applications filed by Petitioners Louis Dale Marcantel and Dewayne Tarver are based on contradicted facts and both should be denied.

This case involves a forty-five year old registered nurse and grandmother, Michell Deville, with no criminal record, who was stopped for an alleged speeding violation in the Turkey Creek, Louisiana. Petitioner Tarver alleges that Michell Deville was speeding on August 5, 2005. However, her testimony refutes that of Dewayne Tarver (who did not "lock in" the speed on his radar gun). Defendants also allege that Michell Deville's refusal to sign a ticket at the scene justified custodial arrest. However, Michell Deville testified that she was never shown the ticket and never asked to sign the ticket before her arrest.

Instead of being given a ticket, the welfare of her grandchild was threatened by an unreasonably aggressive officer. Without any provocation whatsoever, Petitioners Dewayne Tarver and Louis Dale Marcantel worked in concert to shatter Mrs. Deville's driver-side window on her (causing cuts and scarring to her face), forcibly remove her from her vehicle, twist her arms behind her back (causing long-lasting elbow injury), throw her against her vehicle, and put handcuffs on her so tightly that she had permanent nerve damage in both wrists that required four surgeries and extensive medical treatment. All of this harm was inflicted by two Turkey Creek law enforcement

officers in a traffic stop of a woman with no criminal history.

Additionally, Michell Deville was jailed twice stemming out of this one incident on charges that were immediately dropped by the district attorney. The Devilles have already suffered through injustice and injury in Turkey Creek, Louisiana. They brought this matter to court seeking redress for this injustice, and have provided ample evidence to allow this matter to proceed to trial.

Genuine issues of material fact exist concerning the unlawful arrest, excessive force and battery committed against Michell Deville on August 5, 2005.

Plaintiff specifically objects to all issues of error submitted by Petitioners Marcantel and Tarver cited in both writs, as genuine issues of fact permeate the questions of whether Petitioners' actions were objectively reasonable in this matter. Accordingly, the Fifth Circuit was correct in ruling that these contested facts must go to the trier of fact. This Court should deny Petitioner's Writ of Certiorari in this matter.

Plaintiffs-Respondents file this single brief in opposition to the two writs filed by petitioners (one by Marcantel and one by Tarver). Each issue presented by petitioners is opposed below in order of filing.

FACTS OF THIS CASE

On August 3, 2006, Michell and Ricky Deville filed suit in state court. Specifically, Michell Deville alleged that Petitioners, Louis Dale Marcantel and Dewayne Tarver, falsely arrested her, battered her, used excessive force against her and that she was maliciously prosecuted by defendants in violation of her rights under 42 U.S.C. Sections 1983. The Devilles claimed violations of state law by both of these defendants for assault, battery, excessive force, false arrest, false imprisonment and malicious prosecution. Finally, plaintiffs claimed that the Village of Turkey Creek is liable under respondeat superior.

On August 5, 2005, after 6:00 p.m. on a Friday evening, Michell Deville was operating her motor vehicle in a safe and prudent fashion driving her minor grandchild (who was riding in a restrained child car-seat in the backseat) in the Village of Turkey Creek in the Parish of Evangeline, State of Louisiana.

Michell Deville was pulled over without cause by Officer Dewayne Tarver of the Turkey Creek Police Department. Officer Tarver alleged that Mrs. Deville was going fifty (50) miles per hour in a forty (40) mile per hour zone. Mrs. Deville replied that she had her cruise on forty (40) miles per hour. (R. 221, Ex "C" p. 38-43, Court Doc. 42). Officer Tarver could not produce any radar confirmation of speeding.

While complying with officer in handing over her license, Michell Deville noted that the speeding

allegation was "bull····". (R. 221, Ex "C" p. 43, Court Doc. 42). Immediately thereafter and within two minutes of being pulled over, Officer Dewayne Tarver advised that he was arresting Michell Deville and that Mrs. Deville's two-year-old granddaughter would be placed in the custody of "Child Services". (R. 221, Ex "C" p. 49-50, Court Doc. 42).

Bewildered by Dewayne Tarver's aggressive reaction, Mrs. Deville rolled up her window and informed Officer Tarver that she was calling her husband, Ricky Deville, to pick up their granddaughter and assure her granddaughter's well being. (R. 221, Ex "C" p. 50, Court Doc. 42).

According to the Evangeline Parish Sheriff's Office incident report/log, Officer Tarver notified the dispatcher that he was arresting Michell Deville and inquiries were made concerning Child Protection Agency for Mrs. Deville's granddaughter. The mere fact that Child Protection was called so quickly evidences the malicious intention to scare and/or terrorize Mrs. Deville for the well being of her granddaughter.

Turkey Creek Police Chief Louis Dale Marcantel, who was called by Officer Tarver via cell phone, arrived on the scene soon thereafter (not in uniform, but in a sleeveless t-shirt and jeans and reeking of alcohol), and without provocation, shattered the driver's window of Michell Deville's car with his baton, spraying glass upon Michell Deville and the entire car, causing injury to her person, her grandchild and her property. (R. 221,

Ex "C" p. 55-62, Court Doc. 42). Mrs. Deville had cuts about her face and body. Neither Officer Tarver nor Chief Marcantel showed Mrs. Deville a ticket at the scene, and she was never asked to sign a ticket at the scene. (R. 221, Ex "C" p. 106, Court Doc. 42). Michell Deville never attempted to put her car in gear before Chief Marcantel began striking her window. (R. 221, Ex "B" p.51-52, Court Doc. 42).

After shattering the window in her face, Office Tarver and Chief Marcantel forcibly yanked on Mrs. Deville's left arm in an attempt to pull Mrs. Deville out of her vehicle through her broken, driver-side window. After this painful attempt failed, Officer Tarver reached through the broken vehicle and unlocked the door, at which time Officer Tarver and Chief Marcantel forcibly dragged Mrs. Deville out of her car, grabbed and twisted her right arm behind her back, and slammed her into her own vehicle forcing her to fall to the ground. (R. 221, Ex "C" p. 43, Court Doc. 42). Officer Tarver and Chief Marcantel then forcibly handcuffed Mrs. Deville in an excessively tight manner, and put Mrs. Deville into the police vehicle. Throughout this entire extraction sequence, Mrs. Deville's granddaughter was screaming (and Mrs. Deville did not know if her cries were the result of injury from flying glass or the traumatic nature of these events). (R. 221, Ex "C" p. 55-62, Court Doc. 42).

After the incident, Michell Deville was brought to the Evangeline Parish Sheriff's office and then to the hospital. Additionally, Ricky

Deville and the nurses at the hospital will testify that they smelled alcohol on Chief Marcantel's breath. Chief Marcantel has countered these accusations by saying that the reason for this smell is merely his liberal use of "Germ-X" soap on his arms. (R. 221, Ex "C" p. 105, Ex. "A" p. 59, Court Doc. 42). All charges against Mrs. Deville were dropped by the Evangeline Parish District Attorney's Office. (R. 221, Ex "C" p. 77-80, 124, 138, Court Doc. 42).

Michell Deville sustained severe injury to her person as a result of this excessive force as follows:

1. Right upper extremity crush injury - right wrist and fingers required four (4) surgeries due to neuropathy, and multiple injections, braces and therapy for elbow, wrist and fingers;

2. Left upper extremity injury - neuropathy to left wrist; crush injury (like right wrist) from excessive force;

3. Cuts to the bridge of her nose, top/scalp of her head, left nostril, left side of her nose near her eye, above her lip, right ankle, right thigh, left big toe, and the back of her left leg;

3. Injury to her jaw, from being thrust into the vehicle;

4. Bruising and soft tissue injury all over her body, including low back and pelvis;

5. Permanent scarring on her right wrist and face;

6. Mental anguish for having to experience this trauma; and

7. Mental anguish including depression, humiliation and anxiety for her job being placed in jeopardy and having her name listed in the paper as a criminal. (R. 221, Ex "C", Court Doc. 42; Deposition of Dr. Thomas Fontenot (Listed in Appendix as Manual Attachment to Michell Deville's Opposition to Motions for Summary Judgment, Ex. A).

Before this incident, Michell Deville had no history of injuries or claims, and specifically no history of right or left arm pain. She had never been arrested in her life. (R. 221, Ex "C" p. 74, Court Doc. 42).

On the evening of this incident, Michell Deville was taken by Acadian Ambulance to Ville Platte Medical Center and treated for low back pain, right and left wrist pain (swelling and redness noted), headache, right and left shoulder pain, multiple puncture wounds in her scalp with active bleeding and glass, and other lacerations. Michelle Deville followed up with Dr. Thomas Fontenot (general practitioner) the day after the

incident and was diagnosed with the same complaints and with bilateral neuropathy, contusions on her wrists, right shoulder strain, and anxiety. (Deposition of Dr. Thomas Fontenot).

Dr. Fontenot referred Michell Deville to Dr. Barry Henry (orthopedic surgeon), who performed *right carpel tunnel release* and *injections in her right elbow*. Continued problems post-surgery in her right hand, wrist and fingers necessitated a Medrol Dosepak and hand physical therapy. Mrs. Deville's work as a nurse required writing, and this was aggravating her condition. Additionally, she was prescribed a wrist brace and finger splints. Her pain and weakness in her right arm, wrist, hand and fingers progressed until a second round of surgeries was necessary. *Id.*

In December of 2006, Dr. Henry performed the following invasive procedures:

1. Right wrist de Quervain's tenosynovitis release (first extensor compartment),

2. Right trigger thumb release with ganglion excision over the tendon sheath of the thumb,

3. Right middle finger trigger release, and

4. Repeat right elbow injection. *Id.*

Mrs. Deville continues to have problems in her right elbow, wrist and fingers, and this pain

and weakness is now chronic. *Id;* Deposition of Dr. Barry Henry, P. 34. She also has permanent scarring on her hand and wrist. (R. 221, Ex "C" p. 154-155, Court Doc. 42).

These acts have terrorized Mrs. Deville, causing her to lock her doors and fear law enforcement and driving on country roads. Depositions of Ricky Deville, P. 47-51, Ex. C. to 5th Circuit Appellant Brief.

At the time of this accident, Michell Deville was employed by Savoy Home Health as a registered nurse, and as a direct result of her injuries from the excessive force in this case and the two subsequent surgeries, she has incurred past lost wages (totaling $11,095.04).

ARGUMENT IN OPPOSITION TO MARCANTEL WRIT

I. GENUINE ISSUES OF MATERIAL FACTS EXIST CONCERNING WHETHER THE FORCE USED BY MARCANTEL WAS EXCESSIVE; THE FIFTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *MIMMS*.

In his brief in support of writ application, Petitioner Louis Dale Marcantel frames the Section "I" issue by alleging a direct conflict between the Fifth Circuit's decision in this case and this Court's prior ruling in *Pennsylvania v. Mimms*, 343 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) and Louisiana state law.

This argument is a red herring, as is evidenced by the *presupposed contradicted facts* used to support Petitioner's contentions. Petitioner Marcantel uses broad strokes to paint the Fifth Circuit opinion as an unequivocal rejection of qualified immunity in all car extraction cases. Marcantel claims the Fifth Circuit has ruled that all persons have a "clearly established" right from forceful extraction from a vehicle. That is not what the Fifth Circuit held. In fact, the Fifth Circuit carefully dissected the contested facts in this particular case to find that, when viewing the evidence in a light most favorable to the plaintiffs, genuine issues of material fact do exist as to whether Marcantel's actions of smashing the window and forcibly grabbing Michell Deville and dragging her out of her vehicle were objectively unreasonable (excessive force).

In this matter, that reasonableness query is the crux of the case for all issues presented by Petitioners. "The touchstone of the analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" *Mimms* at 109. As stated above, the ultimate determination on whether the force used is excessive is a "reasonableness standard" that should be decided by the jury. Are there genuine issues of fact as to whether the actions of Marcantel were unreasonable? Was it unreasonable or excessive force for Louis Dale Marcantel to show up at the scene, out of uniform, reeking of alcohol, immediately smash the driver's side window on Michell Deville, rip her out of her

car, and forcibly bend her arms behind her back? If so, than summary judgment is improper and this writ should be denied.

The arguments brought by Petitioner Marcantel as the basis for his writ application discuss only Marcantel's side of the story. Specifically, Petitioner continually describes the "exigency of the situation". The problem with that rationale is that the Petitioner uses contradicted facts to support this "exigent" situation and justification for the force used by Marcantel.

Petitioner alleges the following facts in support of its contention that exigent circumstances were present at this August 5, 2005 arrest (all of which are contested and have been contradicted by testimony and cited above) -- Michell Deville behaved irrationally, Mrs. Deville flew into a rage shouting obscenities, Mrs. Deville decided to try the merits of her traffic violation on the road, Mrs. Deville refused to cooperate, twenty-one (21) minutes elapsed while Mrs. Deville was on the side of the road, Mrs. Deville's grandchild was in distress before Marcantel attempted to break the window, Mrs. Deville assaulted Marcantel, Mrs. Deville refused to sign the citation, Marcantel was trying to save the child, and that Mrs. Deville attempted to put her car in gear.

The factual evidence in the record contradicts all of these allegations. As the Fifth Circuit recognized, testimony in evidence from Michell Deville relayed that she was calm, not irrational, was never shown a ticket (and in fact

that the ticket was not even written until she was at the jail), never threatened anyone, and never attempted to flee the scene. (R. 221, Ex "C" p. 139-140, Court Doc. 42). Even Dewayne Tarver agrees that Mrs. Deville never attempted to put the car in gear until after Marcantel began beating on her window in an effort to break it. (R. 221, Ex "B" p. 51-52, Court Doc. 42). These are all issues of fact for the jury.

The reason Petitioner asserts these "exigency" facts is because it cannot justify the force used by Petitioner Marcantel without exigency allegations. These contested issues of fact preclude summary judgment in this matter.

Even Petitioner's own law enforcement expert, Larry Gould, agrees that based on the facts as described by Michell Deville and Officer Tarver (concerning Mrs. Deville never attempting to put her car in gear before Chief Marcantel broke her window), continued negotiations would have been "more appropriate than breaking the glass at that point".[1] Plaintiffs' expert, Lloyd Grafton, testified that breaking the window in a woman's face with a child in the car under these circumstances was excessive force.[2]

Petitioner cites three reasons in support of why it believes Marcantel is entitled to qualified immunity in Section I of its argument:

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[1] Deposition of Larry Gould, P. 39, Attached as Ex. D.

[2] Deposition of W. Lloyd Grafton, Attached Report, P. 4-5.

> 1) In light of *Mimms* and La. C.Cr.P. art. 224, it cannot be said that it is 'clearly established' that an officer uses constitutionally excessive force by breaking a suspect's window to compel her from the vehicle;
>
> 2) Even if plaintiff proves a 'clearly established' right, Chief Marcantel's actions were not objectively unreasonable in light of plaintiff's actions, disobedience of lawful orders and ultimate battery upon Chief Marcantel; and
>
> 3) Chief Marcantel's use of force was sanctioned under Louisiana law generally and specifically pursuant to La. C.Cr.P. Art. 224 and cannot, under these facts, be excessive as a matter of law. Marcantel Writ Application, Pgs. 14 and 15.

In Petitioner's first "reason", Petitioner uses the *Mimms* decision, in support of its contention that Marcantel's actions were reasonable as a matter of law. *Mimms* dealt with a criminal defendant seeking to suppress evidence (an illegally concealed weapon). *None of the facts in Mimms were in dispute.* Two Philadelphia police officers *lawfully detained* Harry Mimms, who was driving an automobile with an expired license plate (uncontested). One of the officers approached and asked respondent to step out of the car, and Mimms alighted. The officer's then noticed a bulge in

defendant's clothing and upon frisking discovered an illegally concealed loaded revolver in his waistband. *Pennsylvania v. Mimms*, 343 U.S. 106, 107, 98 S.Ct. 330, 331, 54 L.Ed.2d 331 (1977). This Court held that it was not unreasonable for an officer under the *Mimms* facts to ask a *lawfully detained defendant* to exit a vehicle (not unreasonable search or seizure).

In this case, issues of fact exist as to whether there was a lawful stop and as to the excessive force used against a grandmother unlawfully stopped, threatened, and the victim of battery and excessive force. This case in no way reverses or ignores *Mimms*.

Additionally, Petitioner cites La. C.Cr.P. Art. 220 and 224, two articles that codify the law that exists everywhere in this country, that an officer *may* use force and *may* even break a window when reasonable. Nothing in these code articles authorize what happened in this case, when the facts are viewed in a light most favorable to the plaintiff.

Neither of these authorities purports to diminish a persons' "clearly established" right to be free from excessive force, as described by the Fifth Circuit in this case:

> When the arrest occurred, Deville had a clearly established right to be free from excessive force, *Tarver v. City of Edna*, 410 F.3d at 753-54, and it was clearly established that the amount of force that the officers could use "depend[ed] on the severity of the

crime at issue, whether the suspect posed a threat to the officer's safety, and whether the suspect was resisting arrest or attempting to flee," *Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008). Accepting Deville's version of events for summary judgment purposes, this case involved: a traffic stop for a minor traffic offense unsupported by probable cause; Deville's passive resistance to being removed from her car and separated from her grandchild, in compliance with her well-established rights under state law to resist an unlawful arrest (*i.e.*, an arrest unsupported by probable cause); the officer's threat of calling child protective services despite no indication that the child was in distress or that Deville intended to flee; an officer who others said smelled of alcohol beating on Deville's driver's window with a heavy flashlight and breaking the window; a rough extraction of Deville from the vehicle by both officers, causing a forceful blow to Deville's abdomen; and handcuffs applied so tightly that they caused severe nerve damage. These alleged facts are sufficiently egregious to warrant a denial of qualified immunity because a reasonable officer would have known that the degree of force was unconstitutionally excessive under the

> circumstances. *See Bush*, 513 F.3d at 501. Accordingly, defendants are not entitled to qualified immunity on the §1983 excessive force claims. (See Appx to Marcantel Writ Application, 20a-21a).

The Petitioner's second "reason" again presupposes Marcantel's actions were not "objectively unreasonable in light of plaintiff's actions, disobedience of lawful orders and ultimate battery upon Chief Marcantel" – all of which are contested issues of fact noted above.

Petitioner's third "reason" in support of Section I reads that because use of force is permitted under Louisiana law, "under these facts", the force as a matter of law cannot be excessive. Again, the basis for this argument is that this force is permissible "under these facts" – *these* facts being the same contested exigency facts mentioned above.

Accordingly, this writ should be denied and the ruling of the Fifth Circuit should be upheld.

II. GENUINE ISSUES OF MATERIAL FACTS EXIST CONCERNING WHETHER MARCANTEL WAS "OBJECTIVELY REASONABLE" IN SMASHING THE WINDOW ON MICHELL DEVILLE TO EXTRACT HER FROM THE VEHICLE.

In this case, the Fifth Circuit laid out the factors to be considered in an excessive force claim concerning the reasonableness of the force used:

> To establish a claim of excessive force under the Fourth Amendment, plaintiffs must demonstrate: "(1) injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Tarver v. City of Edna*, 410 F.3d 745, 751 (5th Cir. 2005). Excessive force claims are necessarily fact-intensive; whether the force used is "excessive" or "unreasonable" depends on "the facts and circumstances of each particular case." *Graham v. Connor*, 490 U.S. 386, 396 (1989); *see also Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (observing that this "area is one in which the result depends very much on the facts of each case"). Factors to consider include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is

> actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. (See Appx to Marcantel Writ Application, 15a-16a).

The Fifth Circuit found that under the *Graham* factors, summary judgment could not be granted in this matter, because of the following evidence presented by Respondent created issues of fact as to the objective reasonableness of the force used:

- Mrs. Deville was stopped for a minor traffic violation -- exceeding the 40 mph speed limit by 10mph -- making the need for force substantially lower than if she had been suspected of a serious crime.

- Mrs. Deville testified that she was never asked to sign a traffic ticket, and therefore never refused to sign one.

- There was no reason to believe that Mrs. Deville's actions posed a threat to the officers, herself, or to her grandchild -- whom Mrs. Deville testified was perfectly calm until Marcantel began beating and breaking the car window.

- Mrs. Deville was in control of the vehicle and its motor was running (to keep the car cool on a hot August day)

and its gear in park, there was no evidence or other indication that she would flee or use the vehicle as a weapon, and she told the officers that she was waiting for her husband to arrive.

- Mrs. Deville's resistance was, at most, passive in that she merely refused to leave her grandchild and exit the vehicle until Mr. Deville came to get the child -- not that she affirmatively, physically resisted as the officers contend.

- Marcantel engaged in very little, if any, negotiation with her and instead quickly resorted to breaking her driver's side window and dragging her out of the vehicle.

- Mrs. Deville's grandchild was quiet during the stop, was not in danger, and only became distressed when the officers began using force.

- Both parties' experts agree that continued negotiations are more appropriate than actual force where the suspect is only stopped for a minor traffic offense and is making no attempt to flee.

As stated above, Michell Deville testified that Petitioner Marcantel smashed her window,

forcibly dragged Mrs. Deville out of her car, grabbed and twisted her right arm behind her back, and slammed her into her own vehicle forcing her to fall to the ground. (R. 221, Ex "C" p. 43, Court Doc. 42). Petitioner Marcantel justifies this force by alleging that Michell Deville was acting wildly and that this was an explosive situation. Michell Deville has testified that she was not acting wildly, but rather that Dewayne Tarver and Louis Dale Marcantel were aggressive and unreasonable in their handling of her. These are issues of fact and make this case one of credibility.

Law Enforcement expert W. Lloyd Grafton testified that a routine traffic stop with an alleged speeding violation of 10 miles per hour over the speed limit should not result in busting out windows, forcibly removing Michell Deville from her vehicle and causing permanent injury. Grafton also testified that the arrest of Michell Deville was not necessary nor was the force used by the officers necessary or reasonable under the conditions.[3]

Officers must assess not only the need for force, but also "the relationship between the need and the amount of force used." *Gomez v. Chandler*, 163 F.3d 921, 923 (5th Cir. 1999). Again, this reasonableness inquiry is fact intensive and the Fifth Circuit has held that plaintiffs have met their burden of providing genuine issues of material fact as to whether Petitioner Marcantel's degree of force was objectively reasonable.

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[3] *Id.*

Petitioner cites three cases in support of its contention that, as a matter of law, Marcantel actions in this case were reasonable. All three cases involve *exigency* not present in this matter. None of these cases involve facts similar to this case, nor do they even generally involve breaking glass to drag someone out of a vehicle in a traffic stop.

1. *Tellez* is case concerning the suppression of firearms evidence in a criminal matter on appeal after conviction. The officers had been advised to look for and eventually pulled over a suspected parole violator's truck with three persons inside. *U.S. v. Tellez*, 11 F.3d 530, 531 (5th Cir. 1993). The driver of the truck, later recognized as a convicted felon by one of the officers, refused to exit and was yanked out of the truck and eventually arrested for possession of illegal firearms. *Id.* The court held that the evidence of firearms was permissible because the "yanking" was due to the exigency surrounding the dangerous situation and risk involved in pulling over a suspected parole violator with two other persons in the vehicle. *U.S. v. Tellez* at 533.

2. The second case cited by defendants actually favors plaintiffs. In *Mecham*, *the facts were not in dispute* and there was a dashboard camera capturing the 50 minute sequence of events after a

person was lawfully pulled over for speeding and driving with a suspended license. *Mecham v. Frazier*, 500 F.3d 1200 (10th Cir. 2007). The court noted that where there are disputed issues of fact the jury is the appropriate fact finder, but "the question of objective reasonableness is *not* for the jury to decide *where the facts are uncontroverted*". *Mecham* at 1203. Emphasis added.

3. Lastly, Petitioner cites the case *Smith v. Ball State Univ.*, 295 F.3d 763 (7th Cir. 2002). In that case, campus police opened a car door and extracted a completely nonresponsive and suspected intoxicated student who had come to rest with his vehicle running on a campus sidewalk after nearly hitting several pedestrians. *Smith* at 766. The court found that the force used was minimal to extract the nonresponsive student and there is no mention of any contradicting facts. *Smith* at 771.

Accordingly, this writ should be denied and the ruling of the Fifth Circuit should be upheld.

III. FIFTH CIRCUIT WAS CORRECT ON THE STATE LAW EXCESSIVE FORCE CLAIMS BECAUSE GENUINE ISSUES OF MATERIAL FACTS EXIST CONCERNING WHETHER *REASONABLE FORCE* WAS USED.

Petitioner Marcantel alleges that "probable cause" for the arrest existed as to Marcantel because of his reliance on Officer Tarver's instruction that Michell Deville refused to sign the ticket. However, Petitioner admits in his own writ application that "Marcantel tried to explain to Deville if she just signed the ticket, she could be on her way." (R. 221, Ex "A", p. 49, ln. 9-14, Court Doc. 42; Writ Application p. 5). Michell Deville testified that she was never shown the ticket and *never asked to sign a ticket by anyone* before her arrest. These are issues of credibility and fact as to both Petitioners. If no ticket was ever produced to Mrs. Deville and Mrs. Deville was never asked to sign a ticket by any officer, then Marcantel's own alleged statement is untrue, thus vitiating whatever reasonable and/or probable "cause" he could have had. Again, issues of fact permeate whether Marcantel even had probable cause.

Petitioner also alleges that "probable cause" for the arrest existed as to Marcantel because of seven (7) disputed facts already discussed above. (Writ Application p. 19).

That "probable cause" prong is only the first step in the reasonable force inquiry. As discussed in detail above, genuine issues of material fact exist

as to the "reasonableness" of the forced used by Marcantel. Accordingly, this writ should be denied and the ruling of the Fifth Circuit should be upheld.

IV. THIS CASE DOES NOT HAVE SIGNIFICANT PUBLIC POLICY IMPLICATIONS.

Petitioner Marcantel wants this Court to grant Writ of Certiorari under the mistaken premise that the Fifth Circuit, in its detailed factual review of this matter (a fact scenario far different from that of *Mimms*), has somehow erased a law enforcement officer's right to compel a driver out of a vehicle.

No one is questioning an officer's right to break a window or compel a person out of a vehicle when the situation warrants it. The reasonableness of the force still has to be considered. This Court's jurisprudence and Louisiana law do not give license to law enforcement officers to go around breaking windows and yanking people out of cars in all situations. The factors for use of force still apply and there must be an inquiry as to whether the force is reasonable.

This case does not involve a simple request to exit a vehicle. It involves an officer threatening a child and disputed facts as to whether the initial stop and eventual arrest were lawful and in good faith.

In support of its public policy argument, Petitioner Marcantel again argues that:

> Chief Marcantel was forced to make a split-second decision on the side of the road in an increasingly volatile situation as to whether to use force to compel this recalcitrant driver out of the vehicle, or do nothing and run the risk that Deville's continued irrational behavior would threaten the life of the suspect, the officer, or an innocent bystander (such as the crying minor child in the back seat of plaintiff's car). (Marcantel Writ Application p. 23).

Petitioner cannot ignore the contested facts that this was not an exigent situation, that Mrs. Deville was not irrational, and that the child was not crying until after he began breaking the window. These are issues of fact.

The Fifth Circuit decision is in compliance with state and federal law and jurisprudence, and as such should be upheld.

ARGUMENT IN OPPOSITION TO TARVER WRIT

A. GENUINE ISSUES OF FACT EXIST AS TO WHETHER TARVER'S ARREST OF DEVILLE WAS LAWFUL.

1. GENUINE ISSUES OF FACT EXIST AS TO WHETHER TARVER HAD REASONABLE SUSPICION TO DETAIN MICHELL DEVILLE.

Petitioner Tarver alleges that, because Tarver had "reasonable suspicion" to stop Michell Deville for speeding, he lawfully detained Mrs. Deville. Again, Tarver's allegations that she was lawfully stopped are premised on the fact that Mrs. Deville was in fact speeding. That is an issue of fact for the jury in this case. The entire remainder of the Tarver writ is premised on this stop of Mrs. Deville being an "lawful stop". As such, Tarver's entire writ fails for the same reasons assigned by the Fifth Circuit: Issues of fact exist as to whether the initial stop and the arrest of Michele Deville were lawful.

Petitioner Tarver's own testimony provides the only allegation of speeding. Mrs. Deville has provided evidence that specifically refutes the speeding allegation and calls into question Tarver's credibility. Thus, issues of fact exist as to whether there was reasonable cause for a lawful stop and probable cause for a lawful arrest.

Petitioner Dewayne Tarver was the first officer to pull Michell Deville over. Defendants' own law enforcement expert, Larry Gould, testified that it is "interesting" to look into a law enforcement officer's history to see if there is a "trend" of the officer acting outside the scope of his authority.[4] When considering Dewayne Tarver's testimony, it is "interesting" to note that Tarver had a history of *threatening to call child protection prematurely, dereliction of duty, quick temperedness*, and a fellow officer testified that he had been involved in numerous instances where he used *excessive force* and made *unlawful arrests*.[5] On one occasion, *Dewayne Tarver was untruthful on the stand at trial*.[6]

Petitioner Tarver admitted that, since this accident, he was *asked by the Sheriff of Evangeline Parish to resign his position with the Evangeline Parish Sheriff's Department and then later asked by the Evangeline Parish District Attorney to resign his position with Turkey Creek and* ***leave Evangeline Parish altogether****, due to on the job complaints against him.* (R. 221, Ex "B" p. 87-88, Court Doc. 42).

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[4] Deposition of Larry Gould, P. 40-42, (Listed in Appendix as Manual Attachment to Michell Deville's Opposition to Motions for Summary Judgment, Ex. D).

[5] Deposition of Sergeant Adam Fruge, P. 5, 35-45, (Listed in Appendix as Manual Attachment to Michell Deville's Opposition to Motions for Summary Judgment, Ex. E).

[6] Id. at P. 44.

In his writ application, Tarver is quick to point out the Fifth Circuit quote that Tarver gave "uncontradicted" testimony that his radar indicated that Mrs. Deville was speeding. First, Mrs. Deville's own testimony that she was not speeding contradicts Tarver's allegation. Second, immediately after that Fifth Circuit quote citied by Tarver, the court clearly points out the genuine issues of material fact concerning Tarver's credibility and whether any cause was present for the stop or arrest:

> Plaintiffs, however, have provided evidence that would allow the jury to disbelieve Tarver's testimony. "[A] motion for summary judgment cannot be defeated solely by conclusional allegations that a witness lacks credibility. Nevertheless, when the circumstances are conducive to lying, well-supported suspicion of mendacity may serve as a legitimate basis for the factfinder's reasonable inferences concerning the ultimate facts at issue." *Thomas v. Great Atl. & Pac. Tea Co.*, 233 F.3d 326, 331 (5th Cir. 2000) (footnote omitted). Summary judgment is not appropriate when "questions about the credibility of key witnesses loom . . . large" and the evidence could permit the trier-of-fact to treat their testimony with "skeptical scrutiny." *Id.* at 331.

Tarver admitted that he has a history of problematic arrests and that citizens have made complaints against him. The Evangeline Parish Sheriff asked him to resign his position as a sheriff's deputy (which he held simultaneously with his position with the Village of Turkey Creek) because of a complaint of excessive force in an unrelated case. More directly implicating his credibility, Tarver admits the parish district attorney asked him to resign from the Turkey Creek police department because he filed a false charge of possession of marijuana against an individual who in fact did not have marijuana (that incident is also otherwise unrelated to the instant case). And although Tarver testified that the radar gun had the ability to "lock-in" a detected speed, he did not "lock-in" the speed in the Deville case -- and, as a result, he was unable to verify the speed when asked by Deville's husband to do so. In light of this discrediting evidence -- especially evidence that Tarver has falsified other charges -- and Deville's sworn testimony that she was not speeding because her cruise control was set on 40mph, a reasonable jury could disbelieve Tarver's testimony and find that he lacked probable cause for the first arrest. (See Appx to Marcantel Writ Application, 9a-10a).

2. GENUINE ISSUES OF FACT EXIST AS TO WHETHER TARVER'S ORDER FOR DEVILLE TO EXIT HER VEHICLE WAS LAWFUL.

The same rationale cited above holds true for Petitioner Tarver's order to Michele Deville to exit the vehicle after the arguably unlawful stop. If Tarver had no reasonable or probable cause to stop Mrs. Deville in the first place, the entire stop was unlawful. Even Tarver concedes this notion in his brief, as he indicates as a premise for his argument that, "It has already been established that Officer Tarver lawfully detained Deville upon a reasonable suspicion that she was speeding". Tarver Writ Application, Page 11. That has not been established. There are issues of fact as to whether the stop was lawful.

As noted by the Fifth Circuit, genuine issues of material fact exist as to whether any reasonable suspicion existed for Tarver to stop Mrs. Deville and as to the veracity of Tarver's speeding allegation.

Tarver's argument to this Court *does* demonstrate a shift in Tarver's legal strategy. Tarver is now claiming that the probable cause for the arrest was not Mrs. Deville's failure to sign the alleged ticket (as argued by Marcantel and previously by Tarver), but that it was her failure to exit the vehicle that led to the probable cause for her arrest. Tarver alleges that Michelle Deville's failure to exit her vehicle when ordered to do so

was "resisting an officer" under Louisiana law. Again, if the stop was unlawful, then the order to exit the vehicle after the stop was unlawful as well. Mrs. Deville has the right to resist unlawful arrest. *State v. Lindsay*, 388 So.2d 781, 782 (La. 1980).

Further, issues of fact exist as to whether Tarver told Mrs. Deville she was under arrest before he ever ordered her out of the vehicle. Evidence has revealed that after being pulled over, Michell Deville was compliant with Officer Tarver at the scene, gave him her license and was reaching for her registration. (R. 221, Ex "C" p. 43, Court Doc. 42). While reaching for her registration and before ever seeing a ticket or being asked to sign a ticket, Officer Tarver advised that he was arresting Michell Deville and that Mrs. Deville's granddaughter would be placed in the custody of "Child Services" (a horrifying notion for a grandmother with no criminal record isolated on a country road). (R. 221, Ex "C" p. 49-50, Court Doc. 42). Only then did Mrs. Deville roll up her window to ensure the safety and wellbeing of her granddaughter. Only two people have given testimony concerning the sequence of events just before the initial stop up to the arrival of Marcantel. Those two people are Michell Deville and Dewayne Tarver.

If Michell Deville's testimony is to be accepted as true, she has a valid claim under the law for false arrest against Officer Tarver. Additionally, Mrs. Deville testified that Tarver announced he was arresting her and calling child services BEFORE asking her to exit the vehicle.

Accordingly, genuine issues of material fact also contradict whether Tarver announced his arrest of Mrs. Deville before or after he ordered her out of the vehicle.

B. GENUINE ISSUES OF FACT EXIST AS TO WHETHER TARVER USED OBJECTIVELY UNREASONABLE FORCE.

In support of Tarver's contention that he was authorized to use "reasonable force", Tarver cites La. C.Cr.P. Art. 220, which requires persons to "submit peaceably to a lawful arrest". A prerequisite to La. C.Cr.P. Art. 220 is that the arrest be *lawful*. Under Louisiana law, a person commits the offense of resisting arrest only if she resists a "lawful arrest" supported by probable cause. La. Rev. Stat. § 14.108(A); *State v. Lindsay*, 388 So.2d 781, 782 (La. 1980). "It is a long-established principle in Louisiana law that a citizen has the right to resist an unlawful arrest." *Lindsay*, 388 So.2d at 782. Thus, whether Mrs. Deville was lawfully arrested depends on whether Tarver ever had probable cause to conduct the arrest in the first place. If Tarver did not, then Mrs. Deville's resistance was lawful. These are issues of fact.

Further, issues of fact also exist concerning whether the amount of force used by Tarver was reasonable. The ultimate determination on whether the force used is excessive is a "reasonableness standard" decided by the jury. In gauging the objective reasonableness of the force used by a law

enforcement officer, the court must balance the amount of force used against the need for that force. *Ikerd v. Blair,* 101 F.3d 430 (5th Cir.1996). A plaintiff asserting an excessive force claim is also required to show that she suffered injury. The injury must be more than a *de minimis* injury and must be evaluated in the context in which the force was deployed. *Knight v. Caldwell,* 970 F.2d 1430 (5th Cir.1992), *cert. denied* 507 U.S. 926, 113 S.Ct. 1298, 122 L.Ed.2d 688 (1993).

Under Louisiana state law, law enforcement officers have no choice in properly applying the handcuffs to arrestees. That is, officers have a duty to apply them in a non-negligent manner. *Saine v. City of Scott,* 819 So.2d 496, 2002-265 (La.App. 3 Cir. 6/12/02).

> An arresting officer owes a duty to the person in the Officer's custody *to protect him or her from injury and to care for his or her safety. See Evans v. Hawley,* 559 So.2d 500 (La.App. 2 Cir.1990). 'The Officer must do what is reasonable under the circumstances and is liable only for a certain category of risks to which his prisoner is subjected.' *Id.* at 504. Defendants' own testimony establishes that officers are required to double lock an arrestee's handcuffs and then insert two fingers between them to assure the cuffs are not too tight. Apparently this procedure is required to prevent an arrestee from suffering injuries that

> could result from excessively tight handcuffs. As noted, the trial court found Officer Romero applied the cuffs too tight and failed to loosen them after being informed by Mr. Saine they were too tight. We find sufficient evidence in the record to support this finding. Officer Romero's action, i.e., his failure to loosen the cuffs after Mr. Saine informed him they were too tight, was an operational task that did not require him to make a policy decision. That is, the decision was not based on "social, economic, or political concerns." *Chaney,* 583 So.2d at 929. He was required to place the cuffs on him in a non-negligent manner. Once Mr. Saine was in his custody, Romero had a legal *duty to protect him from injury.* The trial court found as a matter of fact Officer Romero breached that duty, thereby causing Mr. Saine's injuries; and neither he nor the City of Scott have immunity from liability under La.R.S 9:2798.1. *Saine v. City of Scott,* 819 So.2d 496, 2002-265 (La.App. 3 Cir. 6/12/02).

There are separate instances of Dewayne Tarver using excessive force against Michell Deville on August 5, 2005:

1. His (joined with Louis Dale Marcantel's) forcible removal of Michell Deville from her vehicle,

contorting her arm, and throwing Mrs. Deville against her vehicle; and

2. His handcuffing Mrs. Deville's wrists too tightly causing permanent neurological injury.

The forcible removal issues are briefed above and adopted herein. As for the handcuffing, the handcuffs were extremely tight and caused extensive and permanent wrist injuries to Mrs. Deville. She also testified that she did not feel either officer double lock the handcuffs by placing their fingers between the cuffs and her wrists. (R. 221, Ex "C" p. 147-148, Court Doc. 42). Dewayne Tarver testified in his deposition on July 10, 2007, that the handcuffs were double locked at the time of her arrest but not double locked while she was traveling in the police unit. (R. 221, Ex "B" p. 103-106, Court Doc. 42).

Medical testimony confirms serious, objective injury caused by the handcuffs and substantiating the claim that the handcuffs were unreasonably tight on Michell Deville. Mrs. Deville had swelling in her wrist at the ER the night of the arrest, symptomology in both wrists the next day at the doctor, and testing eventually revealed right wrist crush injury (neuropathy that required multiple surgeries) and left wrist crush injury (neuropathy).[7] Certainly, these injuries far surpass this Court's *de*

[7] Deposition of Dr. Thomas Frederick; Deposition of Dr. Barry Henry.

minimus standard. In fact, her surgeon, Dr. Barry Henry, testified that:

> "This lady had apparently, I wasn't there, handcuffs pressed so hard on her wrists that it squeezed her dorsal sensory nerve of her radial nerve distribution, it squeezed her median nerve, and as you know all nerves are connected in the spinal cord, in the brain, and there's been some pathway set off that didn't completely heal as I would have hoped for Michelle..."[8]

Defendants' criminal justice expert, Larry Gould, agrees that both putting handcuffs on too tightly and failing to double lock handcuffs constitute violations of police policies and procedures.[9] As such, issues of fact again dictate that a jury must decide whether applying handcuffs this tight is unreasonable.

C. OFFICER TARVER IS NOT ENTITLED TO QUALIFIED IMMUNITY IF HE HAD NO CAUSE FOR THE STOP AND/OR IF HE USED UNREASONABLE FORCE.

The qualified immunity paragraph in Tarver's writ is incomplete and difficult to follow. It basically alleges that since Mrs. Deville cannot establish facts in support of a claim for unlawful

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[8] Deposition of Dr. Barry Henry, P. 34.

[9] Deposition of Larry Gould, P.58-59.

arrest or excessive force in violation of her constitutional rights, Tarver is entitled to qualified immunity. Genuine issues of fact exist to the lawfulness and/or reasonableness of the arrest and the force used. As such, Tarver fails to meet his burden for summary judgment. At one point, Tarver asks for *en banc* review and then cites an in depth case analysis to follow that does not materialize.

Respondent adopts all facts, law and analysis presented above in response to both writs filed in this matter. Particularly, Respondent adopts all briefing concerning qualified immunity, excessive force, unlawful arrest and reasserts that issues of fact exist as to whether both Marcantel's and Tarver's actions were objectively reasonable.

CONCLUSION

These Writs for Certiorari filed by Petitioners Marcantel and Tarver should be denied, as the Fifth Circuit committed no error of law and as genuine issues of material fact exist concerning whether Petitioners Marcantel and Tarver were reasonable in the force used in this matter and whether the arrest in this matter was lawful.

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